

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**



# 74-2178, 74-2350

## United States Court of Appeals FOR THE SECOND CIRCUIT

COLONIE HILL LTD.,

*Petitioner.*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

### BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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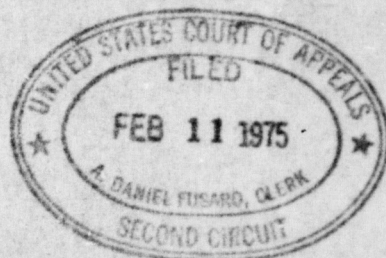
National Labor Relations Board.  
Washington, D.C. 20570

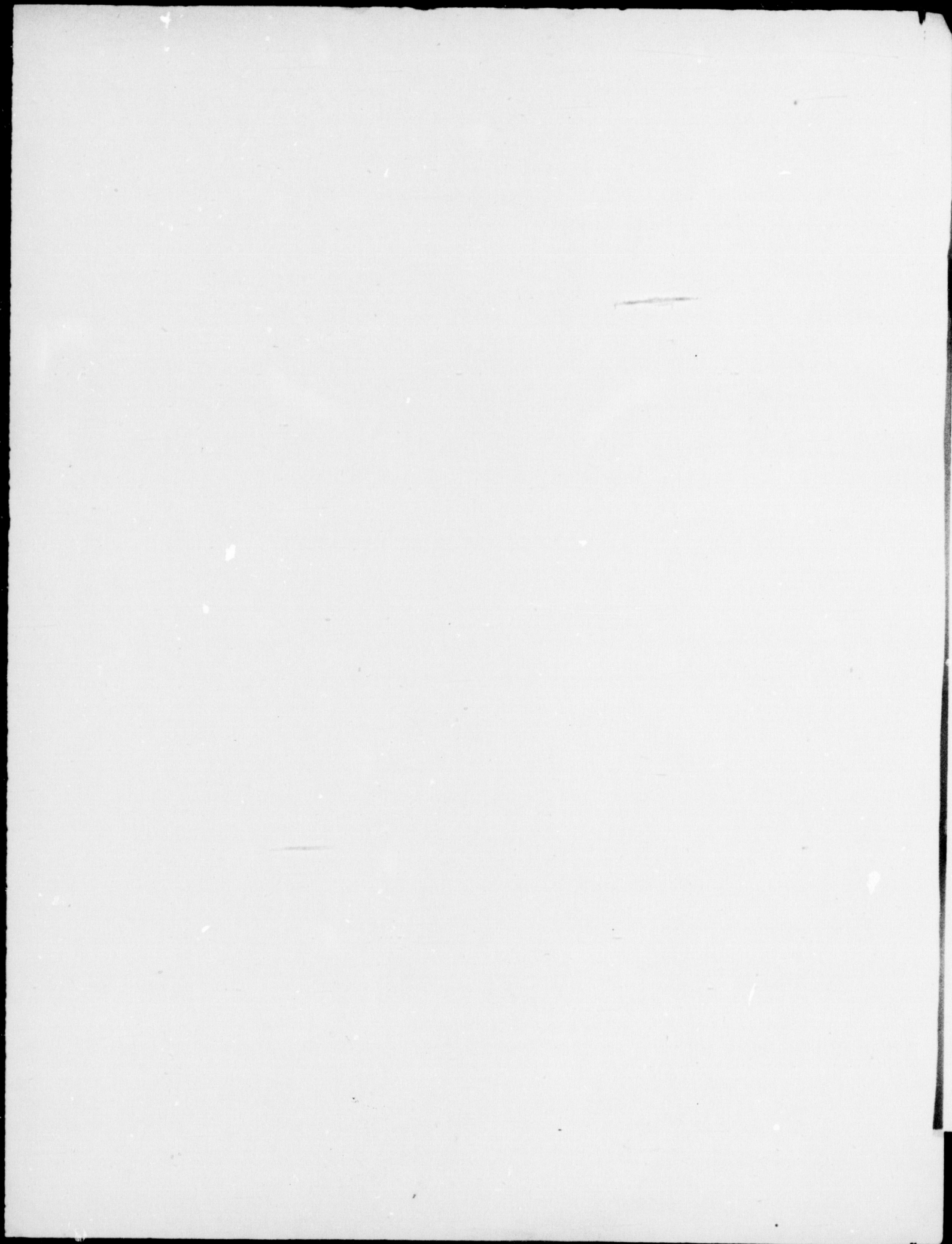
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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the Board properly found that the Company violated Section 8(a)(1) and (2) of the Act by requiring its employees to join Local 100 when there was no valid union security agreement.
2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1), (2), and (3) of the Act by discriminatorily discharging and refusing to reinstate employee Mauro Squicciarini.

## COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Colonie Hill Ltd. (hereinafter "the Company") to review and set aside the order issued against it by the National Labor Relations Board on August 5, 1974, and on the Board's cross-application for enforcement of its order, pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) The Board's decision and order (D-8839),<sup>1</sup> is reported at 212 NLRB No. 114.

This court has jurisdiction, the unfair labor practices having occurred in Hauppague, Long Island, where the Company operates a motel, restaurant, golf course and catering hall.

### I. THE BOARD'S FINDINGS OF FACT

#### A. The Company requires its employees to join Local 100 at a time when there is no valid union-security agreement

On March 4, 1972, the Company and Local 100, Service Employees International Union, AFL-CIO, (hereafter Local 100), entered into a collective bargaining agreement containing a union security clause (A. 22; ET 59, ET 117; E-n. 1-10). Pursuant to unfair labor practice charges filed on August 31, 1972, the General Counsel issued a complaint alleging that the Company had violated Sections 8(a)(1), (2), and (3) and that Local 100 had violated Sections 8(b)(1)(A) and (2) of the Act (A. 17). On November 2, 1972, an informal settlement was entered into in which

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<sup>1</sup> "A." references refer to the pages of the printed Appendix, which contains inter alia the decisions of the Board and its Administrative Law Judge. The transcript and exhibits are reproduced in an Exhibit Volume. Pages in the transcript are referred to as "ET" while the exhibits are referred to as "E".

*inter alia* the Company agreed not to recognize Local 100 as bargaining representative "unless and until Local 100 shall have been certified by the Board," not to threaten employees with discharge if they refused to join Local 100 and not to "give any force and effect" to the collective bargaining agreement with respondent Local 100 executed on March 4, 1972, or to "any modification, extension or supplement thereto." The settlement agreement also provided that the Company was not required to vary any substantive term of employment such as wages or hours established in the abrogated agreement (A. 17; E-L 3). Thereafter an agreement for a consent election was entered into providing for the holding of an election on December 14, 1972 among the Company's service and maintenance employees (A. 18).

On December 14, 1972, Local 100 received the votes of a majority of the Company's employees in the Board-conducted election and on December 26, 1972, it was certified as bargaining representative (A. 18; E-J). Shortly after the certification, two of the Company's assistant personnel directors, Napolitano and Russo decided, without consulting with Local 100, that the pre-settlement agreement with that union could be enforced until a new agreement was executed (A. 19; ET 91-93). Napolitano so advised Personnel Director Troeckel, who thereafter spoke to all the Company's employees, telling them that they had to join Local 100 and requesting that they sign check-off authorizations (A. 19; ET. 14-15, 45, 96). The Company subsequently administered the checkoff arrangement, which provides for the Company to deduct dues from employee wages and forward the money to Local 100 (A. 23; ET 96).

The employees that Troeckel spoke to about joining Local 100 included maintenance department employees Mauro Squicciarini, James Staats, and Werner Eckhert. A week after Squicciarini was reinstated from lay-off in February 1973, Troeckel asked him to join Local 100,

but Squicciarini refused (discussed *infra.*) (A. 19; ET. 19). One afternoon when Staats went to pick up his paycheck shortly after his reinstatement in March, he noticed that quite a few employees were signing up with Local 100. Troeckel came over to Staats and told him that he had to join Local 100. Staats asked Troeckel if he had 30 days to join. Troeckel's response was that he did not have 30 days since he had been employed by the Company earlier. Staats asked Troeckel what would happen if he did not join. Troeckel responded that Staats would be out of a job if he did not join Local 100 (A. 19; ET. 45). During April Supervisor Bob Lockhart told newly hired employee Werner Eckhert that both he and Staats would lose their jobs unless they joined Local 100 (A. 19; ET. 55). A day or two later Eckhert saw Troeckel, signed a Local 100 membership card, and paid his dues (A. 19; ET. 56). Staats also joined Local 100 (A. 19; ET. 54)

In July, 1973, the Company and Local 100 entered into a collective bargaining agreement. The agreement contained union security and check-off provisions (A. 22; ET. 61).

**B. The Company discharges employee Mauro Squicciarini because of his refusal to support Local 100 and other protected conduct**

Mauro Squicciarini was hired as a plumbing and maintenance employee by the Company when it first opened for business in March, 1972 (ET 12; ET 62). During the pre-election period, Company Personnel Director Troeckel told maintenance department employee Mauro Squicciarini on three separate occasions that Squicciarini must sign up with Local 100 or be discharged (A. 18, ET 14-15). Squicciarini replied that either Local 30 or Local 775<sup>2</sup> would be a better representative for the employees than

<sup>2</sup> Both Local 30 International Union of Operating Engineers and Plumbers Local Union 775 were seeking to represent the Company's maintenance employees at that time (A. 18, E-k, 1-5). Both Unions withdrew their respective petitions prior to the election.

Local 100 (A. 18; ET. 14). Shortly thereafter managerial official Walter Conlon<sup>3</sup> also told Squicciarini that he should get out of Local 30 and join Local 100 because the Company should not have more than one union (A. 18; ET. 15-16). Squicciarini responded that Local 100 was not the right union for the maintenance employees. However, Squicciarini thereafter wrote Local 30 to withdraw his authorization (A. 18; ET. 16).

Squicciarini was among the Company employees laid off for economic reasons in January 1973 (A. 19; ET. 16; ET. 63). When the Company reinstated him in February 1973 at a higher salary, assistant personnel director Napolitano led Squicciarini to believe that he would get the position of maintenance department supervisor held by Dickerson who was retiring (A. 20; ET. 18). A few days later personnel director Troeckel asked Squicciarini to join Local 100. Squicciarini refused, telling Troeckel he was a supervisor. Troeckel's response was that the Company's records did not support that claim (A. 20; ET. 19).

About two weeks later, supervisor Neilson told Squicciarini that Lockhart was being placed in charge of the maintenance department. Squicciarini complained to Napolitano, but Napolitano told him that Company President Delillo, Napolitano's uncle, had authorized chief supervisor Neilson to pick his own man for the supervisory job (A. 20; ET. 20). Squicciarini then told Supervisor Neilson that there were no hard feelings on his part and that he was completely willing to work under Lockhart (A. 21; ET. 20).

Squicciarini thereafter maintained his high level of performance until his discharge. In April and May, supervisors Neilson and Lockhart, and

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<sup>3</sup> In December Conlon was working for the architect hired by the owners as a management consultant on the project (ET 156-157). Around March 1973 Conlon entered the Company's employ to function as a "liaison" between the Company, which manages the project and the owners (A. 19; ET 156-157).

agent Conlon, all complimented him on his work (A. 21, ET. 175-176). During this period no supervisor ever criticized his work or said that he was slowing down.

Due to financial difficulties, the Company in April and early May, 1973, reduced the wages of the four maintenance department employees, Squicciarini, Eckhert, Staats, and Cabanas, as well as the wages of maintenance department supervisor Lockhart. Squicciarini complained to both Troeckel and Conlon about the cuts (A. 20; ET. 21-22; ET. 160). In late May Squicciarini and Staats spoke to Local 100's president, O'Keefe, about the maintenance department pay cuts. O'Keefe told them that Company President Delillo had informed him that he no longer needed maintenance mechanics or boiler room engineers and that he was only going to pay union scale for maintenance men and boiler room attendants. O'Keefe advised them that they need not perform the more difficult and technical assignments they normally did because they were not being paid for it (A. 20; ET. 22-23). Squicciarini and Staats conveyed this information to Company supervisors Neilson and Lockhart who told them that the Company would fire them immediately if they did not fully perform (A. 20; ET. 22-23).

Shortly thereafter, Squicciarini went on naval reserve duty from June 3 to June 20. A week after his return to work, the Company discharged him. Supervisor Lockhart told him that the Company did not need him. Supervisor Neilson said that the Company did not like his work (A. 21; ET. 23-24).

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board, in agreement with the Administrative Law Judge, found that the Company violated Sections 8(a)(1) and (2) of the Act by seeking to compel its employees to join Local 100 and

by threatening them with discharge unless they did so. The Board also found, in agreement with the Administrative Law Judge, that the Company violated Section 8(a)(1), (2) and (3) of the Act by discriminatorily discharging employee Mauro Squicciarini.<sup>4</sup>

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to offer employee Mauro Squicciarini reinstatement, with backpay, to reimburse all present employees for any dues, initiation fees, and other monies unlawfully paid Local 100 until the execution of the July 1973 agreement, and to post appropriate notices.

#### ARGUMENT

##### 1. THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (2) OF THE ACT BY REQUIRING EMPLOYEES TO JOIN LOCAL 100 WHEN THERE WAS NO VALID UNION-SECURITY AGREEMENT

Section 8(a)(2) makes it an unfair labor practice for an employer to "contribute financial or other support to a labor organization." Section 8(a)(3) of the Act, however, contains a proviso that nothing in the Act "shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act, as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following . . . the effective date of such agreement . . . ." Accordingly, an employer violates Section 8(a)(1) and (2) of the Act if he requires

<sup>4</sup> The Board reversed the Judge's finding that the Company's action in reducing the pay of the maintenance department's employees was discriminatorily motivated and dismissed that allegation of the complaint.

employees to become members of a labor organization in the absence of a valid union security agreement. *I.L.G.W.U. (Bernard-Altman) v. N.L.R.B.*, 366 U.S. 731 (1961).

As shown in the Counterstatement and as the Company concedes (Br. 10-12), it revived the pre-settlement collective bargaining contract with Local 100, after that union was certified by the Board, and required employees, as a condition of employment, to become members of that organization. It was this contract together with "any modification, extension or supplement thereof" which under the settlement the Company was not to "give any force and effect." By reviving the contract, rather than negotiating a formal, new one, the Company destroyed the "cleavage" (*N.L.R.B. v. Southern Bell Telephone Co.*, 319 U.S. 50, 57-60 (1943)) which the settlement agreement was designed to effect between the Company's initial recognition of Local 100 and any future recognition. Moreover, the revival of the pre-settlement bargaining contract had the effect of denying the employees the 30-day grace period which the statute requires, thus making even clearer the Company's repudiation of the settlement. Accordingly, the Board held that the attempted revival was inconsistent with the settlement and hence void. As noted above, the Company's conduct clearly violated the Act in the absence of a valid union security contract provision.

In attacking the Board's finding (Br. 5-13) the Company tacitly concedes that its conduct violated the Act, if, as the Board found, the pre-settlement agreement could not properly be revived. The Company principally argues (Br. 6-7) that the pre-settlement agreement was not found to be "unlawful" and hence, when the Union was certified, there was no impediment to reviving that agreement. To be sure, as a consequence of the settlement, the issuance of the complaint was not followed by a hearing, decisions by an Administrative Law Judge and by the Board, and

possible review by this Court to determine the legality of the Company's pre-settlement conduct. Before issuing the complaint, however, the Regional Director had determined that the charge "appear[ed] to have merit" (Board Statements of Procedure, Series 8 (29 C.F.R.), Section 101.8-9) and his subsequent efforts to "dispose of the case by amicable adjustment and in compliance with the law" (*ibid.*) manifested an administrative determination "that some remedial action [was] necessary to safeguard the public interests intended to be protected by the [Act]." *Poole Foundry & Machine Co. v. N.L.R.B.*, 192 F.2d 740, 743 (C.A. 4, 1951), cert. den., 342 U.S. 954). Thus, while "not an admission of past liability, a settlement agreement does constitute a basis for future liability and the parties recognize a status thereby fixed." (*Ibid.*). Accordingly, a party to a settlement agreement may be precluded from taking actions which otherwise would have been lawful under existing circumstances, where such conduct is inconsistent with the settlement. *Poole Foundry & Machine Co. v. N.L.R.B.*, *supra*, 192 F.2d at 743-744; *N.L.R.B. v. Stant Lithograph, Inc.*, 297 F.2d 782 (C.A.D.C., 1961); *W. R. Johnston Grain Co. v. N.L.R.B.*, 365 F.2d 582, 586 (C.A. 10, 1966); *N.L.R.B. v. Universal Gear Service Corp.*, 394 F.2d 396, 398 (C.A. 6, 1968).

The Company next contends (Br. 7-10) that the settlement agreement precluded the Company's giving "force and effect" to the old contract only "unless and until Local 100 shall have been certified by the Board." That phrase, however, is used only in that portion of the settlement in which the Company agrees to "withdraw and withhold" recognition from Local 100 (E-L 3). Moreover, extending recognition to Local 100 following certification is perfectly consistent with the notion that "remedial action" was appropriate with respect to the Company's pre-settlement conduct. Reviving the old contract — after obtaining termination of the unfair labor practice proceeding by stipulating that the contract

would be given no further force or effect — is not. As the Fourth Circuit recognized in *Poole Machine & Foundry v. N.L.R.B.*, *supra*, 192 F.2d at 742, settlement is of vital importance to the administration of the Act; indeed, in the most recent fiscal year, the Board settled over 6600 cases — 85 percent of the meritorious cases filed.<sup>5</sup> Obviously, the Board can allow settlements only if they are to have "definite legal effect . . . quite different from a dismissal of the charges." (*ibid.*). We submit that the effect given the settlement by the Board here was appropriate, while that urged by the Company would equate settlement with dismissal of the charge upon agreement to a Board election.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE  
SUPPORTS THE BOARD'S FINDING THAT THE COMPANY  
VIOLATED SECTIONS 8(a)(1), (2), AND (3) OF THE ACT BY  
DISCHARGING EMPLOYEE MAURO SQUICCIARINI BECAUSE  
HE REFUSED TO SUPPORT LOCAL 100 AND ENGAGED IN  
OTHER PROTECTED ACTIVITY

As shown in the Counterstatement, the Board found that the Company discharged employee Mauro Squicciarini — shortly after he protested the cut in maintenance department wages — because of his continuing refusal to join Local 100 following its certification. The gravamen of the Company's defense is that Squicciarini was discharged for cause. We show below that the Board's finding that the Company discriminatorily discharged Squicciarini in violation of Sections 8(a)(1), (2) and (3) of the Act is supported by substantial evidence.

Local 100's certification gave the Company reason to suppose that opposition to its favored union in the maintenance department would cease and that all its service and maintenance employees would join Local

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<sup>5</sup> Thirty-Ninth Annual Report of the National Labor Relations Board (G.P.O., 1974), pp. 210-211.

100. To effectuate this goal, Company personnel director Troeckel, as shown *supra*, pp. 3-4, sought to compel the employees to join Local 100 by urging them to do so and telling them they risked discharge if they declined. Troeckel's attempt was evidently quite successful, for the record shows that virtually all of the Company's employees joined Local 100 including maintenance department employees Staats and Eckhert. However, Squicciarini, who had openly opposed Local 100 before the election refused to join Local 100 when Troeckel spoke to him in February 1973, saying that he was a supervisor. Nevertheless, considering its success with the other employees, the Company had reason to anticipate that Squicciarini would join Local 100 once he realized that, as Troeckel told him at the time, he was under a misapprehension about becoming a supervisor.

But Squicciarini still had not joined Local 100 several months later when he revealed himself to the Company as a troublesome employee in a different matter. At that time he and Staats expressed dissatisfaction about the pay cuts in the maintenance department by relaying to management the advice of Local 100's president that they should refuse to perform skilled maintenance tasks since their wages had been reduced to the rate of unskilled maintenance men.<sup>6</sup> Company supervisors Neilson and Lockhart reacted strongly, saying that any refusal to perform assigned work would result in immediate discharge. Shortly thereafter Squicciarini left for Naval Reserve duty and a week after his return, the Company discharged him.

We submit that the above record evidence clearly shows that Squicciarini was discharged because he persisted in being a troublesome obstacle

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<sup>6</sup> As shown, *supra*, Squicciarini had previously complained individually about the pay cuts to both personnel director Troeckel and Company official Conlon.

to the Company's view of labor relations harmony in the maintenance department. Squicciarini persisted in refusing to join Local 100 even though the Company gave him ample time to do so and spoke out against what he perceived to be an unfair alteration of wages in the maintenance department shortly before his discharge.

Furthermore, this recapitulation of relevant facts makes it clear that the Company's assertions in its brief (Br. 15-17) that Squicciarini engaged in no protected activity subsequent to Local 100's certification is based on a misreading either of the record or the Act or both. Section 7 of the Act protects the employees' "right to refrain from any or all of such activities," as well as the right to engage in union activities. Squicciarini's continued refusal to join Local 100, either voluntarily or under compulsion by the Company at a time when no lawful union security agreement was in effect, was plainly conduct protected under Section 7 of the Act. Likewise, his late May protest of the cut in the maintenance department wages was also protected, concerted activity. See, *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *N.L.R.B. v. Interborough Contractors, Inc.*, 388 F.2d 495 (C.A. 2, 1967). Hence, his discharge for these activities, violated Section 8(a)(1) of the Act. Furthermore, a discharge motivated in part by an employee's refusal to support a favored union violates Section 8(a)(3)'s proscription against discrimination in employment "to encourage or discourage membership in any labor organization" and also renders unlawful support and assistance to the favored union in derogation of Section 8(a)(2). *N.L.R.B. v. Young Metal Products Company*, 385 F.2d 544 (C.A. 7, 1967); *N.L.R.B. v. Fotochrome, Inc.*, 343 F.2d 631, 633 (C.A. 2, 1965), cert. den., 382 U.S. 833. Similarly, a discharge motivated in part by the Company's displeasure at Squicciarini's prompting Local 100 to confront the Company on the question of the wage reduction also violates Section 8(a)(3) because it is a reprisal for union activity. *N.L.R.B.*

*v. Lundy Mfg. Corp.*, 316 F.2d 921, 925-926 (C.A. 2, 1963), cert. den., 375 U.S. 895. Hence, the Board properly found that Squicciarini's discharge violated Sections 8(a)(1), (2) and (3) of the Act.

The Board's finding of discriminatory motivation is illuminated by the inability of the Company's professed reason for the discharge to withstand scrutiny. *N.L.R.B. v. United Mineral and Chemical Corp.*, 391 F.2d 829, 833 (C.A. 2, 1968). The Company's position is that Squicciarini was discharged because his work deteriorated after the Company appointed Lockhart rather than Squicciarini to be a supervisor in the maintenance department March 1973 (Br. 14).

The record reveals that Squicciarini, a skilled and experienced employee,<sup>7</sup> testified without contradiction that following Lockhart's appointment, Squicciarini spoke to Supervisor Neilson, who made the decision, and told him that he could work with Lockhart and that there were no hard feelings thereafter (A. 21; ET. 32). Squicciarini's testimony is also uncontradicted that in April and May 1973 Company officials Lockhart, Neilson, and Conlon complimented him on his work and that no supervisor ever expressed dissatisfaction with his work or said that he was slowing down (A. 21; ET. 175-176).

The only testimony at the hearing offered by the Company concerning a slow down in Squicciarini's work or a change for the worse in his attitude<sup>8</sup> came from two witnesses whom the Administrative Law Judge

<sup>7</sup> As shown *supra*, p. 4. Squicciarini had been with the Company since it opened in 1972. In February 1973, he received a early wage increase following his recall from layoff status.

<sup>8</sup> Neither Head Supervisor Neilson nor Maintenance Department Supervisor Lockhart were called by the Company to testify (A. 21). As these supervisors appear to have been the most qualified and in the best position to observe Squicciarini's work and evaluate it, the Company's failure to call either of these witnesses to testify about whether Squicciarini's work had deteriorated strongly suggests that their testimony would have been unfavorable to the Company's position. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-226 (1939); *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 174 (1973); *National Maritime Union v. N.L.R.B.*, 353 F.2d 521, 523 (C.A. 2, 1965).

found "to have exaggerated their negative testimony" – Assistant Personnel Director Napolitano and mechanic's helper Cabanas (A. 21).<sup>9</sup> One of these Company witnesses, Assistant Personnel Director Napolitano could only point to one incident based on his own direct knowledge which in his view reflected adversely on Squicciarini – namely, that on one occasion, in April, he observed Squicciarini talking to a security guard in the hall.<sup>10</sup> He acknowledged that he did not inquire what Squicciarini was discussing or reprimand him for this or any other incident (ET. 111-113). He also admitted at another point in the hearing that his opinion that Squicciarini's performance had gotten worse was primarily based on conversations with Supervisor Neilson, (ET. 69-70) who as shown *infra*, did not testify. The other Company witness, mechanic's helper Cabanas, could think of only two specific incidents of slow work on Squicciarini's part and did not bring these or any other instances to management's attention.<sup>11</sup> In these circumstances, the failure of record evidence to support the Company's explanation for the discharge supports the Board's finding that Squicciarini's discharge was unlawful.

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<sup>9</sup> The Administrative Law Judge based this credibility determination upon his "observation of the witnesses and their testimony" (A. 21). It is well settled that credibility determinations are matters for the trier of fact and should not be upset on review absent extraordinary circumstances not present here. *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965); *N.L.R.B. v. A&S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

<sup>10</sup> Squicciarini testified that he occasionally talked to security guards about work related problems (A. 174).  
ET

<sup>11</sup> Mechanics helper Cabanas asserted that Squicciarini took too long to return a tool on one occasion and took too long to do a plumbing job on another occasion. Cabanas, a far less skilled employee than Squicciarini, acknowledged that he was not a qualified plumber (ET. 133). His qualifications to judge how long Squicciarini should have taken are therefore suspect.

CONCLUSION

For the foregoing reasons, the petition to set aside the Board's order should be denied, and the Board's cross-application for enforcement should be granted.

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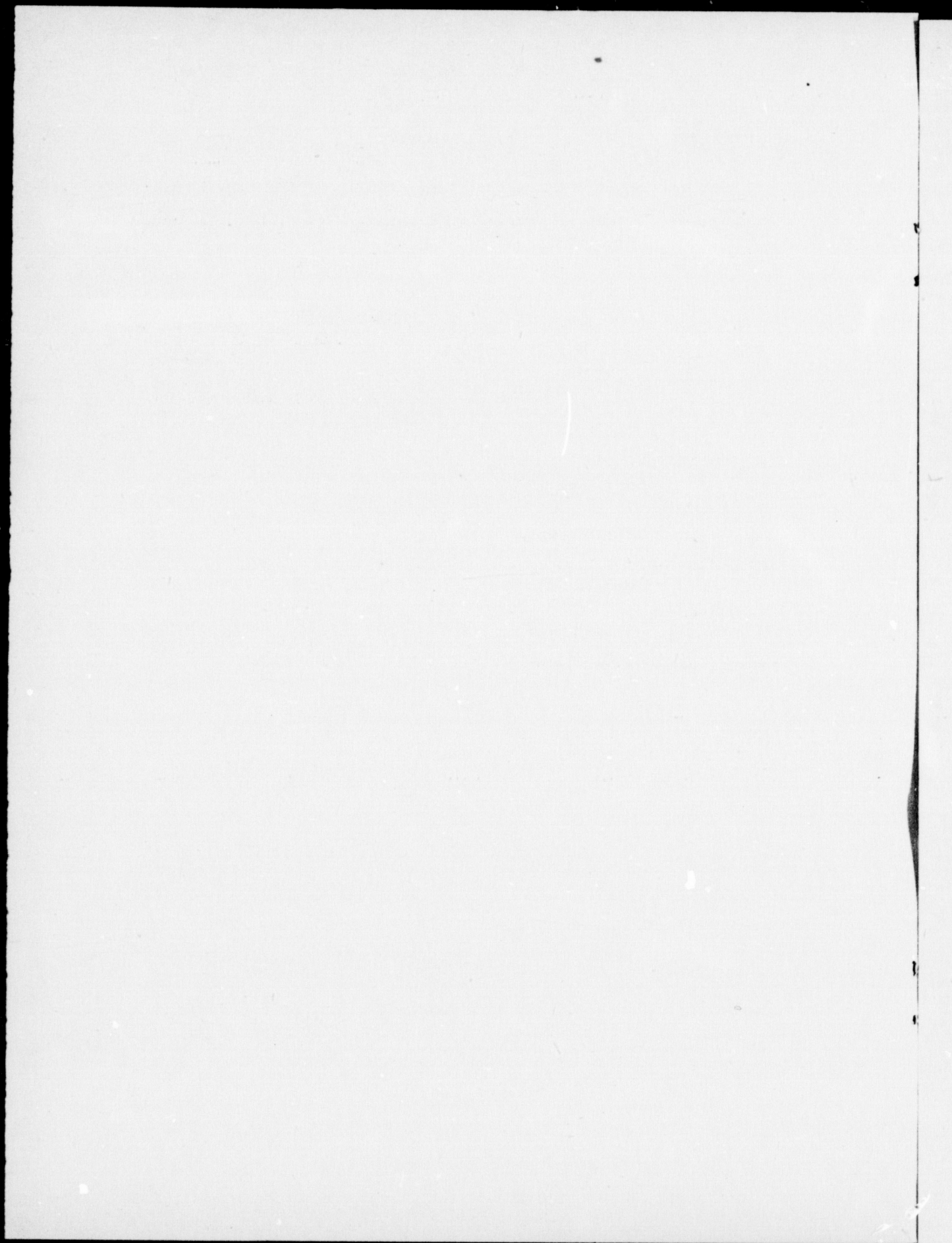
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February, 1975



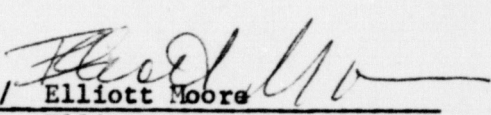
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

COLONIE HILL LTD.,	)	
	)	
Petitioner,	)	
	)	No. 74-2178
v.	)	74-2350
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 10th day of February, 1975